

(I Can't Get No) Restitution: The Supreme Court's Attack on the FTC's Equitable Enforcement Powers

Patrick Gilsonan
Student Fellow, Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

The Supreme Court's partisan turn has been well-discussed in the context of culture war issues and partisan issues such as voting rights, but in recent years the Court has also mounted a jarring attack on administrative agencies.¹ One major change has been the Court's eagerness to limit agencies' longstanding use of certain forms of equitable relief including disgorgement of ill-gotten gains and restitution payments to victims of wrongdoers. A prominent recent example of this relief involved a short-term payday lender that misled consumers over more than a decade, charging consumers illegal interest rates that at times exceeded 1,000 percent.² The Federal Trade Commission (FTC) brought a complaint against lender Scott Tucker and his various companies, including AMG Capital Management, and the FTC ultimately convinced the district court to award nearly \$1.3 billion in restitution and bar Tucker from engaging in further consumer lending.³ The nearly \$1.3 billion in restitution represented the ill-gotten gains pocketed by Tucker, and the district court had ordered the FTC to use these funds first to provide direct redress to consumers, then to use the remaining to provide related equitable relief.⁴

This litigation culminated in *AMG Capital Management v. FTC*, a decision in which the Supreme Court unanimously held that the FTC does not have the authority to seek restitution or

¹Richard Hasen, *The Supreme Court's Pro-Partisanship Turn*, <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/07/Hasen-The-Supreme-Court%E2%80%99s-Pro-Partisanship-Turn.pdf>

² Sudhin Thanawala, *\$1.3B award upheld against racecar driver over payday loans*, Associated Press <https://apnews.com/article/ff7e42ec32564b3498ee2dc7347e410a>

³ *Id.*

⁴ *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1342 (2021)

disgorgement under Section 13(b) of the Federal Trade Commission Act (“FTC Act”). The Court’s holding significantly diminished the FTC’s abilities as an enforcement agency, and the short-term consequence of this decision is that exploited consumers such as those harmed by Tucker will have a much longer, more difficult path to obtain relief.⁵ As noted by then-Acting Chairwoman Rebecca Kelly Slaughter, “the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most.”⁶

This Article will first explore the use of disgorgement by administrative agencies as an effective deterrent for harmful actions, especially as used by the FTC prior to *AMG*. Next, the Article will address the Supreme Court’s newfound hostility to disgorgement and restitution and the narrow textualist analysis that led to its decision in *AMG*. This Article will then survey the FTC’s authority under the Federal Trade Commission Act and the impact of *AMG* on its ability to seek restitution and disgorgement. Finally, this Article will discuss how Congress may react to *AMG* and future developments at the FTC.

Disgorgement and Restitution as a Remedy

Government agencies like the FTC bring enforcement actions against parties who violate applicable laws, and when those violations harm others, they attempt to return money received to those harmed.⁷ Agencies consistently return billions of dollars a year to wronged parties such as consumers and investors through remedies known as disgorgement and restitution.⁸ Through disgorgement, agencies can force companies to give up the profits they earned by violating the

⁵ *Id.* at 1344.

⁶ Fed. Trade Comm’n, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us>

⁷ Prentiss Cox and Christopher Lewis Peterson, Public Compensation for Public Enforcement (March 22, 2021), *Yale Journal on Regulation*, Vol. 39, No. 1, 2022, University of Utah College of Law Research Paper No. 433, Available at SSRN: <https://ssrn.com/abstract=3809786> [hereinafter Public Compensation]

⁸ *Id.*

law, and through restitution, agencies can use disgorged profits to compensate the victims of those violations.⁹ Both disgorgement and restitution are considered “public compensation” by legal scholars, and these remedies serve as a means of financial redress to those wronged by illegal activity as well as deterring future illegal activity.¹⁰

Numerous administrative agencies including the FDA, CFPB, SEC, CFTC, and FTC seek equitable relief in the form of disgorgement and restitution.¹¹ In general, these agencies claim authority to seek public compensation based on two cases, *Porter v. Warner Holding Co.* and *SEC v. Texas Gulf Sulphur*.¹² In *Porter*, the Court held that a government agency, the Office of Price Administration (OPA), had the power to compel disgorgement pursuant to the Emergency Price Control Act.¹³ The OPA relied on Section 205(a) of the Emergency Price Control Act, which did not specifically authorize disgorgement but did allow OPA to seek judicial relief in the form of “a permanent or temporary injunction, restraining order, or other order.”¹⁴ The Court in *Porter* interpreted “other order” broadly, creating a precedent that granted agencies authority to obtain a disgorgement remedy from the district court.¹⁵ In *Texas Gulf Sulphur*, the Court cited *Porter* and other subsequent cases in determining that “the Supreme Court has upheld the power of the Government without specific statutory authority to seek restitution... as an ancillary

⁹ Michael Kades, *Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law*, Washington Center for Equitable Growth, <https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-see-monetary-remedies-when-companies-break-the-law/>

¹⁰ Public Compensation at 4

¹¹ *Id.*

¹² *Id.*

¹³ *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)

¹⁴ Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy under the Federal Securities Laws*, 105 Cornell L. Rev. (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441432 (quoting *Porter v. Warner Holding Co.*, 328 U.S. at 398)

¹⁵ Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy under the Federal Securities Laws*, 105 Cornell L. Rev. (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441432

remedy in the exercise of the courts' general equity powers to afford complete relief."¹⁶ The result of these cases was that courts "recognized that statutory injunctions also authorize disgorgement of money by law violators."¹⁷

This precedent made restitution and disgorgement available to administrative agencies even where the governing statute did not specify these forms of equitable relief. In the case of the FTC, the FTC relied on Section 13(b) of the FTC Act for authority to pursue injunctive relief in a timely and effective manner. Section 13(b) allows the FTC to ask the district court to enter a "temporary restraining order or preliminary injunction" (and in proper cases a "permanent injunction") against those "violating, or about to violate, any provision of law enforced by the Federal Trade Commission."¹⁸ Section 13(b) says nothing of restitution or disgorgement, but the FTC nonetheless relied on *Porter* and other precedent finding general statutory allowances for injunctive relief to include disgorgement and restitution.

The FTC's other viable path to pursue equitable relief is found in Section 19 of the FTC Act, which provides for time-consuming administrative proceedings and a higher standard of proof than that of Section 13(b).¹⁹ Under Section 19, the FTC must demonstrate that "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent" to an administrative law judge (ALJ).²⁰ The ALJ will then either dismiss the complaint, or enter an order to cease and desist the challenged practice.²¹ If the order is challenged, it then goes through several rounds of review, including by the FTC itself and the

¹⁶ Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971)

¹⁷ Public Compensation at 4

¹⁸ 15 U.S.C. § 53(b).

¹⁹ 15 U.S.C. § 57b

²⁰ *Id.*

²¹ John E. Villafranco & Glenn T. Graham, *What If... Section 19 of the FTC Act Becomes the FTC's Best Path to Monetary Relief: Revisiting Figgie International*, Ad Law Access, https://www.adlawaccess.com/2021/01/articles/ftc_section_19/

United States Court of appeals.²² Only after this order is finalized through the administrative process can the FTC bring a Section 19 action in district court to pursue consumer redress including a “refund of money or return of property.”²³ Given the time needed to complete this administrative process, it’s clear why the FTC often prefers to go straight to the courts for relief under section 13(b). Further, in cases such as *AMG* where the behavior was clearly illegal, Section 13(b) is especially beneficial to avoid an administrative process around the merits of a misleading payday lending scheme.

A Pattern of Hostility from the Court

Prior to *Credit Bureau* and *AMG*, the Supreme Court decided a series of cases against the Securities Exchange Commission (SEC) and signaled new limitations on agencies’ ability to seek equitable remedies. The first shot across the bow came in the 2017 case *Kokesh v. SEC*, which both limited the SEC’s use of disgorgement to a five-year limitation period and invited a further challenge to the SEC’s authority to seek disgorgement altogether.²⁴ The Court took up this challenge in its 2020 decision in *Liu v. SEC*. While the Court didn’t eliminate the SEC’s power to seek disgorgement altogether, it did severely curtail its use.²⁵

Similar to the FTC’s reliance on Section 13(b), prior to *Kokesh* and *Liu*, the SEC relied on a provision of the Securities Exchange Act of 1934 (‘34 Act) that allowed the SEC to seek “any equitable relief that may be appropriate or necessary for the benefit of investors.”²⁶

However, unlike the FTC, the Court did not strip disgorgement powers from the SEC altogether, but rather took issue with how the SEC utilized disgorgement. In *Kokesh*, the Court held that

²² *Id.*

²³ *Id.*, 15 U.S.C. § 57b

²⁴ Jonathan Rosenberg, Bill Martin, and Alec Schierenbeck, *Dismantling the SEC’s Federal Court Disgorgement Authority*, New York Law Journal, <https://plus.lexis.com/api/permalink/cb54fc72-efd6-4b41-8209-42658f8a4336/?context=1530671>

²⁵ *Liu v. Sec. & Exch. Comm’n*, 140 S. Ct. 1936, 1940, 207 L. Ed. 2d 401 (2020)

²⁶ 15 U.S.C. § 78u(d)(5)

disgorgement was a penalty for purposes of statute of limitation, and notably included a footnote questioning whether the term “equitable relief” in the ‘34 Act permitted the SEC to obtain disgorgement under any circumstances.²⁷ The Court declined to answer its open question in *Kokesh*, leading agencies across the government to fear it was open season on disgorgement authority.²⁸ Specifically, the Court questioned in its footnote “whether courts possess authority to order disgorgement in SEC enforcement proceedings” and “whether courts have properly applied disgorgement principles in this context.”²⁹

The Court continued its march against disgorgement in *Liu* but decided not to strike a final blow. The Court instead “struck a middle ground, rejecting the broad argument that the SEC could never obtain disgorgement of profits from unlawful activity in securities litigation, but sharply cutting back the remedy as the SEC has envisioned it in recent years.”³⁰ Ruling out the worst case scenario of completely overruling *Porter* and *Texas Gulf Sulpher*, the ultimate effect simply limited the SEC’s reach to that of a traditional equitable remedy – most notably, not allowing for the disgorgement of all revenues, but only of net profits less legitimate business expenses.³¹

The Court issued a far more decisive blow against the FTC. In *AMG Capital Management v. FTC*, the Court unanimously held that the FTC does not have the authority to seek restitution or disgorgement under Section 13(b) of the FTC Act.³² The Court specifically

²⁷ Matthew G. Lindenbaum, Robert L. Lindholm, and Raymond J. Prince, *'Liu v. SEC': One Year Later*, New York Law Journal, <https://www.law.com/newyorklawjournal/2021/06/25/liu-v-sec-one-year-later/?sreturn=20210930143229>

²⁸ *Id.*

²⁹ *Kokesh v. Sec. & Exch. Comm'n*, 137 S. Ct. 1635, 1639, 198 L. Ed. 2d 86 (2017)

³⁰ Ronald Mann, *Opinion analysis: Justices accept, but cabin, SEC's right to disgorgement in securities litigation*, SCOTUSblog, <https://www.scotusblog.com/2020/06/opinion-analysis-justices-accept-but-cabin-secs-right-to-disgorgement-in-securities-litigation/>

³¹ *Id.*

³² *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1344 (2021)

stated that despite *Porter*, the Court had not adopted a universal rule that statutory authority to grant an injunction automatically encompasses the power to grant equitable monetary remedies.³³ The Court instead supplanted *Porter* and *Texas Gulf Sulpher*'s precedent with a hyper-textualist reading. It followed the 7th Circuit's decision in *Credit Bureau* and determined that Section 19 of the FTC Act forecloses on an implied reading of disgorgement authority under section 13(b).³⁴ Specifically, because Section 19 provided a path for the FTC to obtain financial restitution on behalf of consumers through an administrative process, the Court rejected the broad interpretation of FTC's injunctive authority as a means to seek relief directly from the courts.³⁵ The Court concluded that if Congress intended to give the FTC a wider mandate, it would have said so in Section 13(b) by including "and other equitable relief" in the statute.³⁶

This path from the Court favoring disgorgement among enforcement agencies as an effective remedy to a restrictive hyper-textualist approach meant to curtail enforcement agencies has been notable for many reasons, but perhaps none more than *AMG*'s place in antitrust and consumer protection jurisprudence. As Andrew Gavil of Howard University noted, prior to *AMG*, the Supreme Court "demonstrated little, if any, interest in textualism to interpret the principal antitrust statutes."³⁷ According to Gavil, the Court has been anything but a textualist in interpreting statutes such as the Clayton Act, and *AMG* invites an opportunity to "test the Supreme Court's commitment to consistent textualism: If it can unanimously support

³³ *Id.*

³⁴ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

³⁵ *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1344 (2021)

³⁶ *Id.*

³⁷ Andrew Gavil, *Competitive Edge: the silver lining for antitrust enforcement in the Supreme Court's embrace of "textualism."*, Washington Center for Equitable Growth, <https://equitablegrowth.org/competitive-edge-the-silver-lining-for-antitrust-enforcement-in-the-supreme-courts-embrace-of-textualism/>

retrenchment of the FTC’s remedial power, it also could support a renewal of its enforcement authority” that it has curtailed over the decades.³⁸

In the realm of antitrust, *AMG*’s textualism is in stark contrast to what Daniel Crane would call “antitrust antitextualism,” which he describes a “historically persistent phenomenon” in which “judicial disregard of the plain meaning of the statutory texts and manifest purposes of Congress.”³⁹ Crane does not suggest that this antitextualism is partisan in a conservative/progressive dichotomy and instead characterizes it as an idealistic Congress/pragmatic Courts dichotomy.⁴⁰ And yet it is notable that the Court abandoned the rule of antitextualism in antitrust in a case that led it to trim the FTC’s wings in *AMG*.

The FTC’s Curtailed Authority

Despite Andrew Gavil’s hope that the Supreme Court’s has signaled a move away from antitextualism in antitrust, others such as Michael Kades lament the loss of authority at the FTC in the here and now.⁴¹ Kades argues that *AMG* “deprives the antitrust agency of a critical... weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry.”⁴² The impact will be felt in the lack of effective deterrence in companies’ conduct, the drain on the FTC’s resources in litigation without the threat of disgorgement, and the absence of monetary recovery being available to the victims of illegal conduct.⁴³ Indeed, by taking away

³⁸ *Id.*

³⁹ Daniel Crane, *Antitrust Antitextualism*, 96 Notre Dame L. Rev. 1205 (2021), <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7/>

⁴⁰ *Id.*

⁴¹ Michael Kades, *Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law*, Washington Center for Equitable Growth, <https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-see-monetary-remedies-when-companies-break-the-law/>

⁴² *Id.*

⁴³ *Id.*

disgorgement, the Court has severely limited the ability of the FTC to fulfill its mandate of stopping deceptive and unfair business practices and scams.

Then Acting Chairwoman Rebecca Kelly Slaughter shared these concerns in a statement issued after the *AMG* decision. As she put it, “the Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior.”⁴⁴ While the Court did make clear that the FTC can seek restitution and disgorgement using the FTC Act’s administrative procedures still via Section 19, the standard of proof is higher than that of Section 13(b), and the process is longer and less efficient.⁴⁵ That said, the FTC has already seen some success in pursuing restitution through Section 19 instead of Section 13(b), including for Credit Bureau itself in subsequent litigation in the 7th circuit.⁴⁶

Congressional Intervention and Future Developments

The Court’s hostility towards enforcement agencies’ disgorgement and restitution powers has proven to be a setback for consumer welfare, but Congress can still intervene to authorize their abilities in subsequent legislation. In the 2021 National Defense Authorization Act, Congress included a provision that mitigated the damage felt by the SEC after *Kokesh* by establishing a 10-year statute of limitations on disgorgement, and a 10-year statute of limitations for equitable remedies.⁴⁷ While Congress has intervened on the SEC’s behalf, it’s unclear if the Court will take the agency out of its crosshairs, and there has been no action on behalf of the

⁴⁴ Fed. Trade Comm’n, *Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC* (April 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us>

⁴⁵ *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1344 (2021)

⁴⁶ Kim Phan, *FTC successfully uses Section 19 of FTC Act to obtain restitution as alternative to Section 13(b)*, <https://www.consumerfinancemonitor.com/2021/09/20/ftc-successfully-uses-section-19-of-ftc-act-to-obtain-restitution-as-alternative-to-section-13b/>

⁴⁷ Allison Frankel, *Congress hid a big gift to the SEC in defense spending bill awaiting Trump’s signature*, Reuters, <https://www.reuters.com/article/us-otc-disgorgement-idUSKBN28X2HX>

FTC by Congress. The stage appears to be set for a further tug of war over agency authority between a hostile Supreme Court and a sympathetic, but divided, Congress.

The FTC has urged Congress to revive statutory authority to seek restitution and disgorgement, arguing that if Congress does not act promptly, “the FTC will be far less effective in its ability to protect consumers and execute its law enforcement mission.”⁴⁸ One bill intended to address *AMG*, the Consumer Protection and Recovery Act (H.R.2668), has passed the House and has been sent to the Senate.⁴⁹ The bill seeks to reverse *AMG* and resurrect the FTC’s ability to seek disgorgement as well as “restitution for losses, rescission or reformation of contracts, refund of money, or return of property.”⁵⁰ The bill has also received the support of 28 state attorneys general, who have sent a letter to Congress emphasizing the need for Congress to act quickly in restoring the FTC’s authority.⁵¹

Additionally, in the Senate, Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act of 2021 (S.225), which would seek to increase enforcement resources at the FTC and DOJ.⁵² Although it predated the *AMG* decision and does not directly address it, the bill would allow the FTC to recover significant penalties from companies that have committed certain antitrust violations: civil penalties of 15 percent of total U.S. revenues

⁴⁸ Fed. Trade Comm’n, *FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring* (April 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority>

⁴⁹ H.R.2668 - Consumer Protection and Recovery Act, 117th Congress (2021-2022), <https://www.congress.gov/bill/117th-congress/house-bill/2668/text>

⁵⁰ Aaron Nicodemus, *House passes bill to restore FTC’s disgorgement authority*, Compliance Week, <https://www.complianceweek.com/regulatory-policy/house-passes-bill-to-restore-ftcs-disgorgement-authority/30597.article> (quoting H.R.2668)

⁵¹ Letter to Congressional leaders Re: Consumer Protection and Recovery Act (H.R.2668) (June 2021), <https://coag.gov/app/uploads/2021/06/2021.06.28-FTC-Letter.pdf>

⁵² Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement, News Release, <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>

for the previous calendar year or 30 percent of U.S. revenues earned from conduct that violates the antitrust laws.⁵³

The bills' futures remain uncertain, however, as the Senate's Democratic majority is slim and bipartisan interest in antitrust reform is far more focused on big tech monopolies than the FTC's restitution and disgorgement authority.⁵⁴ S.225 has remained in committee since February 2021, and H.R.2668 has not yet been introduced in the Senate despite being sent in July 2021. Further, Republicans and lobbying groups like the U.S. Chamber of Commerce have come out strongly against the House bill, arguing that they would not support an unconditional restoration of the FTC's authority.⁵⁵

Conclusion

After *AMG*, the FTC is likely to face a more uphill battle holding bad actors accountable and protecting consumers from illegal practices. The Supreme Court's willingness to overturn decades of precedent to curtail regulatory enforcement authority should concern consumer advocates. The attack on the FTC's reliance on Section 13(b) did not come out of the blue but followed the Court's decisions in *Kokesh* and *Liu*, which signaled the Court's general hostility to disgorgement and restitution. Although there may be an opening for agencies to spin strict textualism for the benefit of antitrust regulations in other avenues, the damage done to the FTC leaves enforcement in a precarious condition without congressional intervention. The days of relying on friendly precedents such as *Porter* are over, and agencies must move forward with the

⁵³ *Id.*

⁵⁴ Cat Zakrzewski, *Senators aim to block tech giants from prioritizing their own products over rivals*, Washington Post, <https://www.washingtonpost.com/technology/2021/10/14/klobuchar-grassley-antitrust-bill/>

⁵⁵ U.S. Chamber Letter on H.R. 2668, "Consumer Protection and Recovery Act", [uschamber.com/regulations/us-chamber-letter-hr-2668-consumer-protection-and-recovery-act](https://www.uschamber.com/regulations/us-chamber-letter-hr-2668-consumer-protection-and-recovery-act)

understanding that favorable precedent and generous interpretations of statutes may not apply in the future.

Congress must act quickly to respond to the Court's attacks and uphold the FTC's authority to seek restitution and disgorgement through Section 13(b) by enacting explicit language that will withstand further scrutiny. Whether it be the existing Consumer Protection and Recovery Act that has passed the House, or a provision in some larger bill like the SEC received in the National Defense Authorization Act, it is imperative to the public interest that Congress respond to the Courts in kind. The FTC has other avenues in the meantime that it can and should pursue, but anything short of a repudiation of *AMG* would leave consumers substantially worse off.